ORIGINAL

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
	)	
Wireless Consumers Alliance, Inc.	)	WT Docket No. 99-263
	)	
Petition For a Declaratory Ruling Concerning Preemption of	)	
State Court Awards of Monetary Relief Against Commercial	)	
Mobile Radio Service Providers	)	

To: The Commission

PETITION FOR RECONSIDERATION OF THE CELLULAR TELECOMMUNICATIONS INDUSTRY ASSOCIATION

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Date: September 13, 2000

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SUMMARY

On August 14, 2000, the Commission released a declaratory ruling concerning whether Section 332(c)(3) of the Communications Act preempts state courts from awarding monetary relief against commercial mobile radio service ("CMRS") providers. The Commission ruled that, while Section 332(c)(3) does not *per se* preempt the award of monetary damages by state courts, the question of "whether a specific damage calculation is prohibited by Section 332 will depend on the specific details of the award and the facts and circumstances of a particular case." See *Memorandum Opinion and Order* at ¶ 2.

CTIA agrees with the Commission's finding that the question of whether Section 332(c)(3) preempts state court damage awards must be made on a case-by-case basis with reference to the specific facts of a particular controversy. CTIA believes, however, that the Commission's declaratory ruling is flawed in a number of significant respects. The declaratory ruling includes a broad ranging discussion that is susceptible to varying interpretation, and will simply engender further uncertainty regarding the appropriate scope of preemption under Section 332(c)(3)(A). While the order makes clear that each case must be decided on its own facts, the Commission's speculation about which cases might or might not be subject to preemption may very well lead to a misinterpretation of the broad Congressional intent underlying Section 332(c)(3)(A). Moreover, the portions of the order that could be read to permit backward looking relief, including refunds, are inconsistent with the order's core ruling as well.

In CTIA's view, the failure of the Commission's declaratory ruling arises from the fact that the Commission improperly focused its analysis on the broad question of whether awarding monetary damages for violation of state consumer protection or breach or contract claims constitutes state regulation of rates. Insofar as the Commission has elected to issue a declaratory ruling in this matter, CTIA submits that the ruling should focus not on "damages" but on the specific relevant statutory language, *i.e.*, the meaning of "regulate" the "rates charged by." Clear interpretation of this language will provide state courts the standards and analytic tools necessary to judge on a case-by-case basis when a plaintiff's theory of the case is preempted by Section 332.

Further, the Commission's failure to interpret the relevant statutory language of Section 332(c)(3) also lead the Commission to improperly disregard relevant case law, on the grounds that the case law arose in the context of the filed rate doctrine. CTIA does not contend that the filed rate doctrine as a doctrine is controlling in this matter. However, the filed rate doctrine cases constitute the largest and most informative body of law regarding what properly constitutes rate regulation -- the very question the Commission should be addressing in response to the WCA petition. In addition, the Commission has itself previously relied upon filed rate doctrine cases in interpreting Section 332(c)(3). Contrary to the Commission's assertion, the "other terms and conditions" language of that section does not limit the relevance of the filed rate cases on this question.

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To: The Commission

PETITION FOR RECONSIDERATION OF THE CELLULAR TELECOMMUNICATIONS INDUSTRY ASSOCIATION

The Cellular Telecommunications Industry Association[1] ("CTIA") hereby submits this Petition for Reconsideration of the Memorandum Opinion and Order released in the above-captioned proceeding on August 14, 2000.[2] As discussed below, CTIA respectfully requests that the Commission reconsider the *MO&O* to clarify the broad intent of Congress in preempting all state authority to regulate CMRS rates in Section 332 of the Communications Act. The Commission should analyze the terms of the statute to provide guidance as to the state actions that are "fenced off" from state interference by Section 332(c)(3). Thereafter, as the Commission

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[1] CTIA is the international organization of the wireless communications industry for both wireless carriers and manufacturers. Membership in the association covers Commercial Mobile Radio Service ("CMRS") providers and manufacturers, including 48 of the 50 largest cellular and broadband personal communications service ("PCS") providers.

[2] *In the Matter of Wireless Consumers Alliance, Inc. Petition For a Declaratory Ruling Concerning Preemption of State Court Awards of Monetary Relief Against Commercial Mobile Radio Service Providers*, WT Docket No. 99-263, Memorandum Opinion and Order, FCC 00-292 (rel. August 14, 2000) ("*MO&O*").

has already held, state courts must determine on a case-by-case basis the justiciability of a given action.

I. INTRODUCTION

The *MO&O* is a declaratory ruling addressing a petition filed by the Wireless Consumers Alliance, Inc. ("WCA") concerning whether Section 332(c)(3) of the Communications Act preempts state courts from awarding monetary relief against commercial mobile radio service ("CMRS") providers. In essence, the Commission declared that, while Section 332(c)(3) does not *per se* preempt the award of monetary damages by state courts, the question of "whether a specific damage calculation is prohibited by Section 332 will depend on the specific details of the award and the facts and circumstances of a particular case."[3]

CTIA agrees with the Commission's finding that the question of whether Section 332(c)(3) preempts state court damage awards must be made by the courts on a case-by-case basis with reference to the specific facts of a particular controversy. CTIA believes, however, that the *MO&O* is flawed because it fails to resolve an existing controversy or remove existing uncertainty regarding the preemptive scope of Section 332(c)(3). To the contrary, the *MO&O* includes statements that appear to undermine the Commission's ruling that the lawfulness of damage awards must be determined on a case-by-case basis. Elsewhere, there are suggestions that could erroneously be construed to support an argument that rate refunds or other backward looking judgments are generally permissible. Such a result would conflict with the language and spirit of Section 332(c)(3), the fundamental rate regulatory scheme established by the Communications Act, relevant precedent, and the *MO&O* itself. To avoid the risk of further uncertainty and controversy regarding the appropriate scope of preemption under Section

332(c)(3)(A), the Commission should restate its holding free from any suggestions that could be interpreted to conflict therewith, and clarify that Congress intended to broadly preempt state action which has the effect of evaluating the reasonableness of CMRS carrier set rates.

The failure of the *MO&O* to resolve controversy or eliminate uncertainty arises from the fact that the Commission addressed the question of whether awarding monetary damages for violation of state consumer protection or breach of contract claims constitutes state regulation of rates, rather than interpreting the relevant statutory language. As discussed below, CTIA submits that the Commission's analysis should focus not on the question of "damages," but rather on the specific relevant statutory language, *i.e.*, the meaning of "regulate" the "rates charged by." Clear interpretation of this language will provide state courts with the standards and analytic tools necessary to judge when a state court damages award is preempted by Section 332. Indeed, CTIA submits that a proper reading of the relevant statutory language reveals that state damage awards that require the court to evaluate the reasonableness of the rates charged by a CMRS provider constitutes rate regulation preempted under Section 332(c)(3)(A).

II. THE *MO&O* FOSTERS UNCERTAINTY BY FAILING TO PROPERLY FOCUS ON THE MEANING OF THE RELEVANT STATUTORY LANGUAGE "REGULATE" THE "RATES CHARGED BY"

The Commission miscasts the real issue raised by the WCA petition and improperly focuses its analysis on the general concept of "damages," an area which trial courts have far more expertise. At the outset, the Commission characterizes the issue as "whether *damage* awards against CMRS providers are preempted by Section 332(c)(3) of the Communications Act."[4] The Commission subsequently concludes that the primary inquiry is whether "the award of monetary

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[3] *MO&O* at ¶ 2.

[4] *MO&O* at ¶ 2 (emphasis supplied).

damages is necessarily equivalent to rate regulation and thus preempted, or does awarding damages generally fall under allowable state action on terms and conditions."[5]

With this broad and categorical statement of the issues, the Commission's findings are unsurprising, but they are generally unhelpful to state courts dealing with these issues. Specifically, the Commission stated that:

> while we conclude that Section 332 does not generally preempt damage awards based on state contract or consumer protection laws, this is not to say that such awards can never amount to rate or entry regulation. Nor do we here conclude that a damage award in the WCA litigation or any other specific case would or would not be consistent with Section 332(c)(3). We believe the question of whether a specific damage award or a specific grant of injunctive relief constitutes rate or entry regulation prohibited by Section 332(c)(3) would depend on all facts and circumstances of the case.[6]

The Commission, thus, focused its analysis on the broad question of whether awarding monetary damages for violation of state consumer protection or breach of contract claims constitutes state regulation of rates. As a result, it reached the correct, but unsurprising, conclusion that Section 332(c)(3) does not *per se* preempt all state lawsuits brought under consumer protection laws, but instead preemption must be resolved on a case-by-case basis.

Unfortunately, the *MO&O* does not remain faithful to its stated conclusion that state courts are better positioned to decide whether a given action is really about the propriety of the rate set by a CMRS provider. Instead, it wanders off into non-specific and unclear verbiage such as: (1) "Section 332 does not *generally* preempt damage awards;"[7] (2) "a consideration of the

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[5] *Id.* at ¶ 13. The Commission also asserts erroneously that the CMRS industry, in comments filed in this proceeding, adopted the position that "awarding *monetary damages* for violation of state consumer protection or breach of contract claims *necessarily* constitutes state regulation of rates." *Id.* at ¶ 11 (emphasis supplied).

[6] *Id.* at ¶ 39.

[7] *MO&O* at ¶ 39 (emphasis supplied).

price originally charged, for the purposes of determining the extent of the harm or injury involved, is *not necessarily* an inquiry into the reasonableness of the original price;"[8] and (3) "The Award of Monetary Damages Does Not *Per Se* Constitute Impermissible Rate Regulation."[9]

CTIA agrees that the question of whether Section 332 preempts a specific damage award necessarily depends on the facts of a particular case. CTIA submits, however, that the Commission should have focussed on interpreting the terms of Section 332, thereby establishing the appropriate scope of preemption under the statute. The courts can then apply that wisdom in each case to determine whether a plaintiff's theory of the case and damages is preempted by Section 332(c)(3). This division of labor is appropriate because the courts are best positioned to review a given case and determine whether the theory of the case and damages is preempted. Such an analysis by the Commission may have truly resolved a controversy for state courts.

III. THE *MO&O* SHOULD BE RECONSIDERED AND REVISED TO ELIMINATE FUNDAMENTAL UNCERTAINTIES AS TO THE SCOPE OF FEDERAL PREEMPTION UNDER SECTION 332(c)(3)(A)

The public and the state courts would be better served if the Commission would focus its analysis on the meaning of the phrase "no State . . . shall have any authority to regulate . . . the rates charged by any commercial mobile service," as it appears in the statute.[10] It is this statutory language which states court must interpret in determining whether a given action is justiciable regardless of how a plaintiff denominates his or her case.[11] Thereafter, the courts can discern

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8 *Id.* at ¶ 38 (emphasis supplied).

9 *Id.* at p. 8.

10 47 U.S.C. § 332(c)(3)(A).

11 *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 US 102, 108 (1980) (stating "the starting point for interpreting a statute is the language of the statute itself.").

what a given action is really about and whether it falls into the area the Commission defines as "fenced off" by Section 332.

A. A Proper Reading of the Relevant Statutory Language Reveals that State Damage Awards that Require the Court to Evaluate and Revise the Rates Charged by a CMRS Provider Constitutes Rate Regulation Preempted Under Section 332(c)(3)(A)

In 1993, Congress enacted the Budget Act, which included amendments to Section 332(c) of the Communications Act that established an exclusive federal regulatory scheme for radio-based commercial mobile services, which the FCC termed CMRS.[12] Wireless common carriers were facing competition from each other and from nominally private carriers who were not subject to state rate or entry regulation.[13] Congress decided to equalize this disparate regulation by creating the new category of CMRS and preempting state authority to regulate rates and entry concerning *all* CMRS carriers. CMRS was defined very broadly to cover cellular, PCS, interconnected SMR, and functionally indistinguishable carriers. Section 332(c)(3) provides that "*no State . . . shall have any authority to regulate the rates charged by any commercial mobile service*, or any private mobile service."[14] The legislative history makes clear that Congress sought "[t]o foster the growth and development of mobile services that, by their nature, operate without regard to state lines as an integral part of the national telecommunications

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[12] Omnibus Budget Reconciliation Act of 1993 ("Budget Act"), § 6002, Pub. L. 103-66, 107 Stat. 312 (1993); 47 U.S.C. § 332(c).

[13] Prior to the amendment, private carriers were statutorily exempt from entry and rate regulations by the states and in turn enjoyed expansive liberties not afforded to those who were viewed as common carriers. H.R. Rep. No. 111, 103rd Congress, 1st Sess., 260 (1993).

[14] 47 U.S.C. § 332(c)(3)(A) (emphasis added).

infrastructure," and that it achieved this broad federal purpose by "pre-empt[ing] state rate and entry regulation of all commercial mobile services."[15]

It is clear then that Section 332(c)(3) expresses "an unambiguous congressional intent to foreclose state regulation in the first instance."[16] Indeed, as the Second Circuit has recognized, Section 322 establishes a "general preemption of state rate regulation," which may be defeated only where states petition the Commission and demonstrate a failure of market conditions "to protect subscribers adequately from unjust and unreasonable or discriminatory" conduct by CMRS carriers and such carriers have become a substantial substitute for landline service.[17] States carry a high burden of proof to successfully prosecute these petitions, and to date no State has made the required showing.[18]

Nevertheless, the Commission appears to ignore this fundamental Congressional policy of favoring of a broad preemptive effect. To be sure, the FCC does make clear that some damage awards would be preempted as rate regulation by Section 332. The Commission, however, offers broad commentary suggesting that "a consideration of the price originally charged, for the purposes of determining the extent of the harm or injury involved, is not necessarily an inquiry

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[15] H.R. Rep. No. 111, 103d Cong., 1st Sess. 260 (1993), *reprinted in* 1993 U.S.C.C.A.N. 378, 587. Moreover, the Telecommunications Act of 1996 provided that it did not intend to change the state preemption contained in Section 332(c)(3)(A). *See* 47 U.S.C. Section 253(e) (as added by the 1996 Act).

[16] *See Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services*, 9 F.C.C.R. 1411, 1504 (1994) ("*CMRS Second Report and Order*").

[17] *Conn. Dept. of Public Utility Cont. v. FCC* 78 F.3d 842, 846 (2d Cir. 1996).

[18] *See Petition of the People of the State of California and the Public Utilities Commission of the State of California to Retain Regulatory Authority over Intrastate Cellular Service Rates*, 10 F.C.C.R. 7486, 7493 (1995).

into the reasonableness of the original price and therefore is permissible."[19] This may be true as far as it goes, but it is also true (and not stated in the opinion) that an evaluation of the price as originally charged for the purpose of determining if the service provided was appropriate is just as equally impermissible rate regulation. We are confident that the Commission did not intend to imply that the scope of preemption under Section 332(c)(3) is limited to those instances where a plaintiff asks a state court to rule on the reasonableness of the rates charged or set reasonable rates in the future," but the opinion engenders confusion in this area that the Commission can and should remove.[20]

B. The Rate Regulatory Scheme of the Communications Act Also Supports a Broad Interpretation of the Preemptive Effect of Section 332(c)(3)

CTIA previously demonstrated that the Commission should also look to the regulatory scheme of the Communications Act in interpreting the significance of the "regulate" the "rates charged by" language of Section 332(c)(3), but this was largely ignored by the Commission. The regulatory scheme of the Act makes clear that adjustments to rates based on the quality of service provided are fundamental elements of rate regulation, and therefore preempted.

Sections 201 through 205 of the Act set forth the Commission's authority to regulate carrier rates. Under this process, common carriers set their rates by filing a tariff. Initial review of the tariff, however, is limited only to situations where the tariff is "so patently a nullity as a matter of substantive law that administrative efficiency and justice are furthered by obviating any

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19 *MO&O* at ¶ 38.

20 *See, e.g., id.* at ¶ 25. The Commission does not dispute that CMRS ratemaking is a field that is fully and expressly occupied by the federal government. *See MM&O* at ¶ 13 ("At the outset of our analysis on the preemptive scope of Section 332, we observe that Section 332(c)(3)(A) bars state regulation of, and thus lawsuits regulating, the entry of or the rates or rate structures of CMRS providers.").

docket at the threshold rather than opening a furtile docket."[21] After the fact review is an integral part of this carrier-initiated rate regulation process. Section 204 provides the Commission express authority to grant refunds after a hearing to determine the reasonableness of the rates.[22] Further, the United States Supreme Court has long recognized that determining the reasonableness of common carrier rates and providing refunds or reparations to consumers charged unreasonable rates are the essence of rate making.

> The [Interstate Commerce Act] altered the common law by lodging in the Commission the power theretofore exercised by courts, of determining the reasonableness of a published rate. If the finding on this question was against the carrier, reparation was to be awarded the shipper, and only the enforcement of the award was relegated to the courts.[23]

The statutory scheme in the Communications Act demonstrates that prospective rate adjustments as well as retrospective rate review (e.g. refund proceedings) are part of the rate regulation process as that term has been understood for decades. The concept of "rate regulation" under Section 332 is no less broad and should be interpreted consistent with this overall statutory scheme. In fact, section 332 directly recognizes the applicability of these rate regulation sections of the Act since it grants the FCC authority to forbear therefrom. Even then, the FCC may entertain complaints under section 208 of the Act that the rates set by the carrier

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[21] *Municipal Light Boards v. FPC*, 450 F.2d 1341, 1346 (D.C. Cir. 1971). In situations in which the tariff is not patently unlawful, the Commission may suspend the tariff for up to 5 months and begin an investigation, *see* 47 U.S.C. § 204, but it need not do so, and its decision to allow a tariff to go into effect rather than suspend and investigate is unreviewable. *See Direct Marketing Association v. FCC,* 772 F.2d 966, 969 (D.C. Cir. 1985); *ARINC v. FCC,* 642 F.2d 1221, 1235 (D.C. Cir. 1980); *Southern Railway v. Seaboard Allied Milling Corp.*, 442 U.S. 444, 455 (1979).

[22] 47 U.S.C. § 204.

[23] *Arizona Grocery Co. v. Atchison, Topeka & Santa Fe Railway,* 284 U.S. 370, 384-85 (1931) (internal citations omitted), *accord Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 578-79 (1981).

are unjust, unreasonable, or discriminatory. The terms regulation of rates interpreted in the context of the overall Act clearly encompasses both forward- and backward-looking components.

C. The Commission Improperly Cast Aside Highly Relevant Precedent By Erroneously Concluding That The Filed Rate Doctrine Has No Relevance To The Analysis Of Rate Regulation Under Section 332(c)(3)(A).

Reconsideration of the *MO&O* is equally in order to properly evaluate the statutory language in light of applicable precedent, which the Commission improperly rejected. While the filed rate doctrine cases[24] (including *Central Office)*[25] involve an application of the filed rate doctrine which admittedly is not applicable per se to CMRS providers, those cases are important here for a different reason -- they speak directly to the relevant statutory language ("regulate" the "rates charged by").

Many commenters to this proceeding supported their arguments that certain awards of money damages are equivalent to rate regulation by referring to cases in which courts held that the award of damages was barred by the "filed rate doctrine."[26] The Commission disregarded these cases on the basis that "filed rates" do not apply to CMRS services and that the filed rate doctrine arose under an entirely different regulatory scheme.[27]

Since the proper scope of the Commission's inquiry is the meaning of what constitutes rate regulation for purposes of Section 332(c)(3), the Commission must reconsider its treatment

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[24] *Id.* at ¶¶ 15-22.

[25] *American Telephone and Telegraph Co. v. Central Office Telephone, Inc.*, 524 US 214 (1998).

[26] *MO&O* at ¶ 15.

[27] *Id.* at ¶¶ 15-22.

of the filed rate doctrine cases. The filed rate doctrine cases comprise the largest body of case law which sheds light on what actions constitute rate regulation by a state court.[28]

Equally important, the Commission has itself explicitly acknowledged the relevance of filed rate doctrine cases to the interpretation of Section 332(c)(3). In *Southwestern Bell Mobile Systems, Inc.*, the Commission construed the term "rates charged" in Section 332(c)(3)(A) by reference to *Central Office,* a filed rate doctrine case.[29] Specifically, the Commission relied upon *Central Office* for the proposition that "rates do not exist in isolation. They have meaning only when one knows the services to which they are attached." Based upon this holding, the Commission held that "the term 'rates charged' in Section 332(c)(3)(A) may include both rate levels and rate structures for CMRS and that the states are precluded from regulating either of these.[30] The *MO&O* erroneously characterizes the Commission's earlier ruling as addressing only the nonjusticiability of rates.[31] In fact, *Southwestern Bell Mobile* appropriately acknowledges and adopts the Supreme Court's broad definition of what constitutes rates and ratemaking. The *MO&O* cannot now ignore that precedent.

Like the statutory language, legislative history, and the regulatory scheme of the Act itself, the filed rate doctrine cases support a broad interpretation of the preemptive effect of Section 332(c)(3). In particular, the cases make clear that nonjusticiable "rates" include prices as

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[28] CTIA, BellSouth and the other carriers were explicit in their assertion that while the filed rate doctrine itself does not apply to wireless carriers, the reasoning of these cases offer significant insight into the appropriate scope of preemption under Section 332(c)(3). *See, e.g.*, CTIA Comments at 16; *cf MO&O* at n.47.

[29] *Southwestern Bell Mobile Systems, Inc.*, 14 FCC Rcd 19898 (1999).

[30] *Id.*, 14 FCC Rcd at 19906.

[31] *MO&O* at ¶ 20 & n. 67.

well as the interrelated terms of a carrier-subscriber relationship, are nonjusticiable. As the Second Circuit has explained:

> (1) legislatively appointed regulatory bodies have institutional competence to address rate-making issues; (2) courts lack the competence to set . . . rates; and (3) the interference of courts in the rate-making process would subvert the authority of rate-setting bodies and undermine the regulatory regime.[32]

Contrary to the suggestion in the *MO&O*, the cases dismissing "rounding up" claims because they required judicial ratemaking are relevant to the instant proceeding because they demonstrate that damages for allegedly misleading practices would effectively change a carrier's rates — a result barred by Section 332.[33] In *Day v. AT&T,*[34] the California Court of Appeal addressed a case where CMRS subscribers sought injunctive and monetary relief for allegedly misleading advertising practices relating to the "rounding up" of time charged to AT&T prepaid calling cards. The Court held that while plaintiffs were free to seek an injunction, they could not seek monetary relief because awarding such relief would require the court to engage in rate regulation:

> To the extent [plaintiffs] do not seek a monetary recovery they may proceed with their action for injunctive relief. They may not seek to recover any money from [defendants] whether they label their request one for disgorgement or otherwise. The net effect of imposing any monetary sanction on the [defendants] will be to effectuate a rebate. . . .[35]

As did the trial court in the instant case, the Court of Appeal in *Day* observed that the resolution of the plaintiff's claim for monetary relief "would enmesh the trial court in a determination of the

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[32] *Fax Telecommunicaciones Inc. v. AT&T,* 138 F.3d 479, 489 (2d Cir. 1998), *quoting Sun City Taxpayers' Association v. Citizens Utilities Co.,* 45 F.3d 58, 62 (2d Cir. 1995).

[33] *See* Exhibit 1 to Petition at 5-6; Exhibit 2 at 5-7; Exhibit 6 at 8-9.

[34] *Day v. AT&T,* 63 Cal. App. 4th 332 (1998).

reasonableness of the rates."[36] This would also be the result if the case involved a CMRS carrier's conduct involving the similar facts.

In *Marcus v. AT&T,*[37] the court rejected attempts by a subscriber to challenge an interexchange carrier's rounding-up practice under state laws governing breach of warranty, fraud, negligent misrepresentation, deceptive acts and practices, unjust enrichment, and false advertising. The court held that plaintiffs "who were able to prove their claims and recover damages would effectively receive a discounted rate," and this would violate the filed rate doctrine when it "precludes any judicial action which undermines agency rate-making authority," including a class action.[38] The court would have reached the same result if the defendant had been a CMRS carrier because the analysis of whether the remedy fashioned by the court is tantamount to rate regulation is the same in either case.

The resolution of the monetary claims in *Day* and *Marcus* was barred because they would have required the trial court to determine the reasonableness of the rates charged. Damage awards which require the same determination regarding CMRS rates are similarly barred by Section 332(c)(3). The Commission, however, dismisses the relevance of cases upholding the preemption of state action over CMRS rates because they were based upon the reasoning found in *Day* and *Marcus*.[39] CTIA submits that these cases correctly found that awarding damages based upon an evaluation of the reasonableness of CMRS rates is nothing more than the regulation of rates and is preempted by Section 332(c)(3).

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35 63 Cal. App. 4th at 337.

36 *Id.* at 338.

37 *Marcus v. AT&T*, 138 F.3d 46 (2d Cir. 1998).

38 *Id.* at 60, 61.

39 *MO&O* at ¶ 28.

CONCLUSION

Given the broad preemptive effect Congress intended for Section 332 and the consistently broad interpretation of the concept of rate regulation, CTIA submits that a proper reading of the "regulate" the "rates charged by" language leads inevitably to the conclusion that the scope of preempted activities is not limited to the traditional cost-plus practice of utility industry rate-making. Indeed, as CTIA has demonstrated above, the relevant language of Section 332 is broad enough to include not only the traditional regulatory process but also any state action to "prescribe, fix, or set" or otherwise adjust the price paid by consumers for CMRS services.[40] This conclusion is in fact consistent with the Commission's statement in the *MO&O* that:

> a court will overstep its authority under Section 332 if, in determining damages, it does enter into a regulatory type of analysis that purports to determine the reasonableness of a prior rate or it sets a prospective charge for services.[41]

CTIA agrees that "regulatory type" judgments by states are the appropriate focus of a preemption analysis under Section 332(c)(3). But that renders irrelevant the cases cited in the *MO&O* in which state damage awards have merely an incidental or indirect effect upon the prices charged by a carrier.[42] In those cases, the court judgments merely had the effect of indirectly increasing carriers' costs of doing business. By contrast, where a given case would require the court to assess the specific value or price of wireless services received (or not received) by a customer, that assessment is effectively rate regulation preempted by Section 332(c)(3).

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[40] *See Petition of the Connecticut Department of Public Utility Control to Retain Regulatory Control of the Rates of Wholesale Cellular Service Providers in the State of Connecticut*, 10 FCC Rcd. 7025, 7061 (1995).

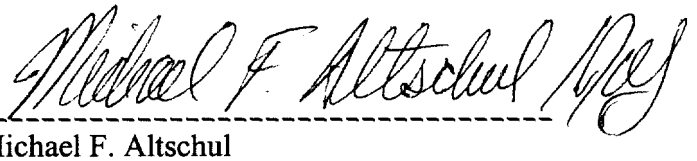
[41] *MO&O* at ¶ 39.

[42] *Id.* at ¶¶ 32-34.

For the foregoing reasons, CTIA respectfully requests that the Commission reconsider the *MO&O* to clarify the broad intent of Congress to preempt all state authority to regulate CMRS rates expressed in Section 332. The Commission should then analyze the terms of the statute to provide guidance as to the state actions that are "fenced off" from state interference by Section 332(c)(3). Thereafter, as the Commission has already held, state courts have to determine on a case-by-case basis whether it has authority to award damages based on an analysis of the plaintiff's theory of the case.

Respectfully submitted,

CELLULAR TELECOMMUNICATIONS INDUSTRY ASSOCIATION



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